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Brf. of Kinkead & Ellis for D.C.

(17,392.)

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In the Supreme Court of the United States.

No. 206.

August J. Henkel,
Plaintiff in Error.

vs.

The City of Cincinnati, a Municipal Corporation, et al.,
Defendants in Error.

BRIEF FOR THE CITY OF CINCINNATI.

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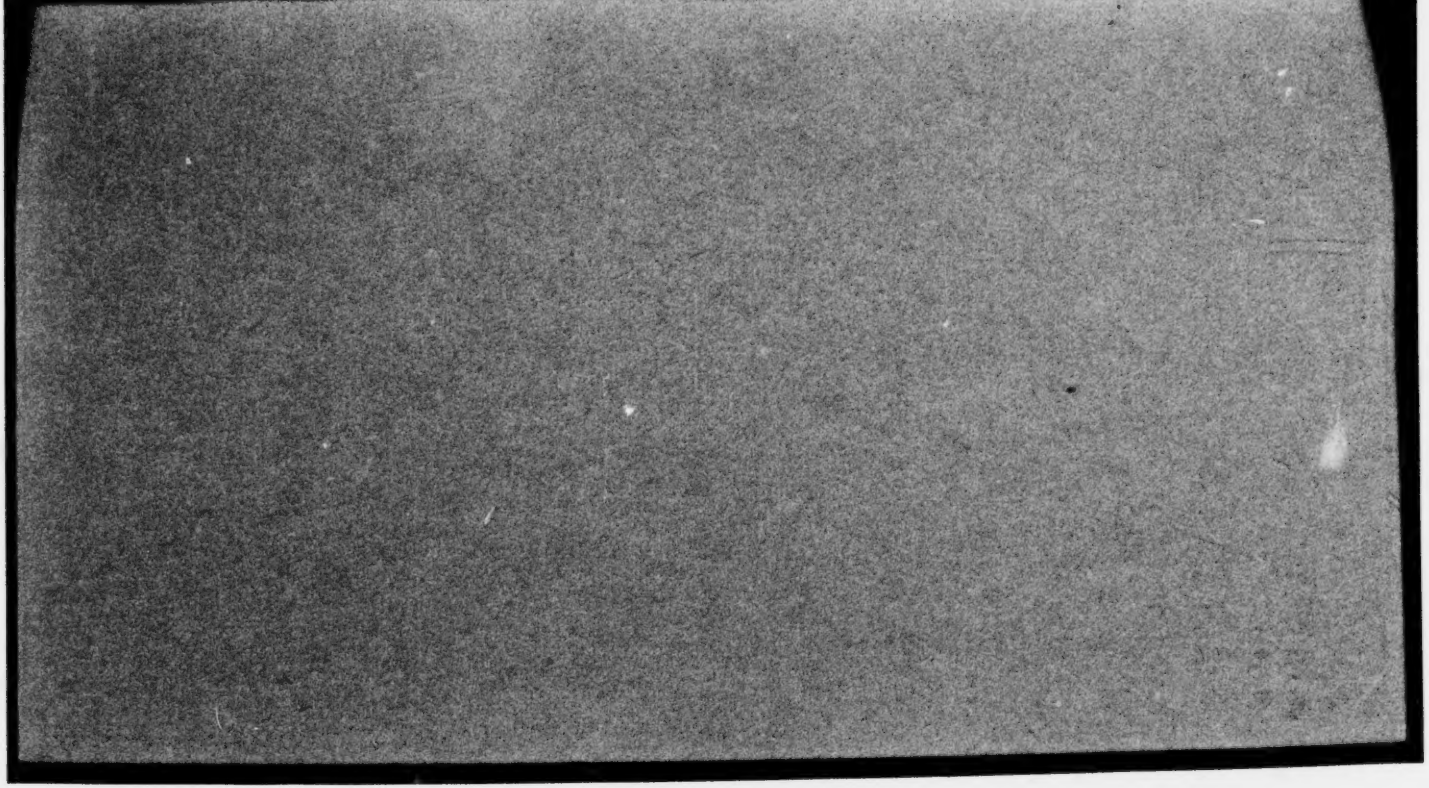

(17,292.)

In the Supreme Court of the United States

August J. Henkel,

Plaintiff in Error,

No. 206.] *vs.*

The City of Cincinnati, a Municipal Corporation, et al.,

Defendants in Error.

BRIEF FOR THE CITY OF CINCINNATI.

DISTINCTIONS BETWEEN THE CASE AT BAR AND THAT OF NORWOOD vs. BAKER.

This case was decided in the Supreme Court of Ohio in June, 1898 (Record, p. 17), that court affirming the decisions rendered in both the lower courts of the State of Ohio. The case of *Norwood* v. *Baker*, 172 U. S. 269, was decided in this court December 12, 1898, and thereupon the plaintiff in error, considering that the issue in the case at bar was similar to that presented in the case of *Norwood* v. *Baker*, caused to be made on the journal of the Supreme Court of Ohio, on January 6, 1899, more than six months after the decision of the case, an entry (Record, p. 17) reciting that a federal question was submitted to that court for decision, and thereupon prosecuted his writ of error to this court.

The plaintiff in error relies entirely for a reversal of the judgment of the Supreme Court of Ohio upon the case of *Norwood* v. *Baker*. In the latter case, the Village of Norwood, in the State of Ohio, acquired by condemnation proceedings in the Probate Court a strip of land through Baker's property, for street purposes, and paid therefor the amount found by the jury to be its value, to-wit, $2,000. An ordinance was then passed by the village assessing against the remaining property of Baker on both sides of the strip appropriated the entire cost of the condemnation, to-wit, $2,000 representing the purchase price, and $218.58 being the cost of the condemnation proceedings, in all the sum of $2,218.58. This court enjoined the collection of that assessment, holding that an exaction for a public improvement in substantial excess of the special benefits accruing to the property was, to the extent of such excess, a taking of private property without compensation; and that the assessment in that case made by the front foot rested upon a basis which excluded any consideration of benefits, the Village of Norwood manifestly proceeding upon the theory that the abutting property could be made to bear the whole cost of the entire improvement whether it was benefited or not to the extent of such costs.

There is no similarity between the facts in the *Norwood-Baker* case and those in the case at bar. The important distinctions between the two cases are as follows:

1. The total assessment was apportioned between Henkel's property and the city at large.

In the *Norwood-Baker* case, the appropriation, for street purposes, was of a strip of land *through the center of plaintiff's property*, and his remaining lands on either side were assessed not only for the entire value of the strip taken, but for the cost of the condemnation proceedings. As this court said in that case:

"It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening and extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in any respect for the land taken for the street; for, by opening the street at his own cost, he might have saved at least the expense attending formal proceedings of condemnation."

In the case at bar the land taken for street purposes is a strip thirty feet in width off the end of Henkel's lot, and the assessment against him is *less than one-half of the cost of this appropriation;* the other one-half of the value of the land taken being a net compensation to Henkel, and borne by the City of Cincinnati at large.

2. The facts raise no presumption that the assessment and the benefits were not equalized.

In the *Norwood-Baker case* there was no possible equalization of the benefits and the assessment, for the reason that the property owner was required to pay the full value for street purposes of the land taken, besides the cost of the condemnation proceedings. The jury in the condemnation proceedings having determined that the value of Baker's property appropriated was $2,000, it is evident that the assessment against him of $2,218.58 was an assessment in excess of the benefits resulting from the opening of the street. Indeed, it was in excess of the total value of the street itself, either to Baker or to the village at large. If the property assessed had not belonged to Baker, its owner could for $2,000 have purchased from Baker the ground desired for street purposes and dedicated it to the public. Thus it is evident that the value of the land is the maximum limit of the benefits conferred upon abutting property by its appro-

priation to public use. To put it in another way: the benefit to the abutting property owner of the opening of a new street cannot, in the nature of things, exceed the value for street purposes of the land taken, and if the assessment upon him is for a sum in excess of the value of the land appropriated, it is manifest that such assessment was levied without regard to any resulting benefits to him.

In the case at bar the value of Henkel's property taken for street purposes was fixed by the jury at $40 per front foot, making the sum paid to him as compensation for the taking $1,200. Council determined to assess against his remaining property, abutting on the improvement, the sum of $714.33 as *his proportion of the cost of the improvement.* These facts certainly do not raise a presumption that there was no equalization of the assessment to the special benefits conferred, or that the assessment was in substantial excess of the benefits.

3. The record shows a consideration by council of the question of special benefits.

In the *Norwood-Baker* case nothing appears to show a determination by council in its appropriating ordinance that the abutting property was specially benefited by the improvement. In the case at bar the appropriating ordinance provided in its second section that the amount found by the jury as the value of the property taken, together with the costs of the proceeding, should be assessed per front foot "upon the lots and lands bounding and abutting upon that part of Hopson street included within the above description, the said lots and lands being hereby declared to be the lots and lands which will be specially benefited by said appropriation, according to the laws and ordinances on the subject of assessments." (Record, p. 9.) As counsel for the plaintiff in error say in their brief, at page 6:

"The City of Cincinnati by its council *declared* by its ordinance of December 31, 1899, that the lots and lands bounding and abutting upon the strip of ground to be appropriated were the lands which would be *specially benefited by said appropriation.*"

4. There is nothing in the Record to show that the excess of the assessment over the benefits, if any, is substantial or material.

In the *Norwood-Baker* case the excess of the assessment over the special benefits was clearly substantial. There the one abutting property owner was obliged to pay the entire cost of the strip of land taken for street purposes, as well as the expenses incident to the appropriation. Manifestly, this was an assessment in substantial excess of special benefits, for the greatest possible benefits that can be calculated, from the appropriation of land for street purposes is the value of the land taken, and Baker was assessed not only for this but for a sum in addition thereto, to wit, for the costs of the appropriation.

In the case at bar the total cost of the land condemned, including the expenses of the proceedings, is $1,457.80, and the assessment against the plaintiff in error is $714.33, the balance being borne by the city at large under the conditions of the assessing ordinance. These figures certainly raise no presumption that the assessment is in substantial excess of the benefits. A simple computation will show that the assessment against Henkel's remaining property bears no unreasonable or unjust proportion to the value of the property assessed. According to the verdict of the jury in the condemnation case, the strip of land taken was worth $40.00 per foot. At this rate the remainder of Henkel's lot upon which the assessment falls, being 198 feet wide, is worth $7,920.00. Upon this property an assessment was levied of $714.33. This is *less than ten per cent of the value of the property.* It cannot

seriously be contended that the opening of the street will fail to benefit an abutting lot to the extent of ten per cent of its value.

This court in the *Norwood-Baker* case say in the second syllabus thereof:

"The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation; but, unless such excess of cost over special benefits be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment."

The plaintiff in error is asking a court of equity to restrain the enforcement of a special assessment, and we submit that there is no showing whatever that the excess of the assessment he complains of over the special benefits conferred upon his property is of a material character. On the contrary, the record shows by the figures themselves that the assessment upon Henkel's property bears a reasonable proportion to the value of the property itself, and cannot be in excess of the special benefits conferred, unless we are to assume that abutting property receives no benefits whatever from the opening and improving of new streets.

THE ASSESSMENT WAS LEVIED WITH DUE REGARD TO SPECIAL BENEFITS.

The record in this case shows that in all proceedings taken by the municipality in levying an assessment upon Henkel's property due regard was had to the special benefits to be conferred upon said property by the contemplated improvement. The condemnation ordinance (Record, pp. 8, 9) declares that the cost of the appropriation shall be assessed upon the lots and lands bounding upon that part of Hopson

street included within the described lines, the said lots and lands being in the language of the ordinance "hereby declared to be the lots and lands which will be specially benefited by said appropriation, according to the laws and ordinances on the subject of assessments." This was passed December 31, 1889.

Thereafter, on September 21, 1892, the assessing ordinance was passed (Record, pp. 9, 10). In this ordinance it is clear that a determination was had by the municipal authorities upon the question of benefits, for the total cost of the improvement is apportioned between the city and the private owner whose lands abut the improvement. *There is nothing in the record to show that this apportionment was not made after due inquiry.* The condemnation ordinance had provided that the assessment should be made "according to the laws and ordinances on the subject of assessments," and it must be assumed, in the absence of any showing to the contrary, that the municipal authorities observed and did not violate the laws and ordinances on the subject of assessments.

The statutes of Ohio require a consideration of benefits.

The statutes of Ohio on this subject provide that special assessments depend for their validity upon the theory that special benefits are conferred upon the property assessed. It is unlawful under the Ohio statutes to levy a special assessment in excess of the special benefits. These laws were in force at the time the assessing ordinance in the case at bar was passed.

Section 2271 of Bates Annotated Ohio Statutes is as follows:

"In cities of the first grade of the first class, and in corporations in counties containing a city of the first grade

of the first class, the tax or assessment specifically levied or assessed upon any lot or land for any improvement shall not, except as provided in section 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and except, as provided in section 2272, there shall not be collected of such assessment in any one year more than one-tenth of such value of the property on which the assessment is made; and in cities of the third grade, first class, the tax or assessment specially levied or assessed upon any lot or land for any improvement, shall not, except as provided in section 2272, exceed twenty-five per centum of the value of such lot or land, as determined by the council in advance of the assessment or at the time of making the same, which valuation shall not exceed a fair market value of such lot or lands after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and, except as provided in section 2272, there shall not be collected of such assessment in any one year, more than one-tenth of such value, of the property on which the assessment is made; and whenever any street or avenue is opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed only on the lots and lands bounding and abutting on such part of such street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one-half in width of any street or avenue has been dedicated to such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from the lots and lands on the other side thereof, no part of the cost and expense thus incurred shall be assessed on the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, *but said special assessment shall not be in any case in excess of benefits;* provided, that in any case in which a street or avenue is opened, extended, straightened or widened, a part of the cost and ex-

pense thereof, not in excess of benefits, may be assessed upon the lots and lands bounding and abutting on any such other part, or said "first-mentioned side" of such street or avenue, or of any intersecting street or avenue, as the owners of a majority of the feet front thereof have petitioned for such improvement and consented in such petitions to be so assessed; also provided, that nothing in this section contained shal apply to any improvement ordered commenced or completed prior to the passage of this act."

It will be observed that this section distinctly declares that no special assessment in any case shall be in excess of benefits.

Section 2264, Bates' Revised Statutes, is as follows:

"In the cases provided for in the last section, and in all cases where an improvement of any kind is made, except in cities of the second grade of the first class, of an existing street, alley or public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made, and in the manner and subject to the restriction herein contained, provided, however, that in cities of the fourth grade of the second class, which by the federal census of 1890 had and those which by any subsequent federal census may have a population of not less than seven thousand six hundred and ninety (7,690) nor more than seven thousand seven hundred (7,700) the council may assess one-third of the costs and expenses

of making any such improvement upon the general tax duplicate of such city, and two-thirds thereof against the bounding and abutting lots and lands according to the foot front, and in either such case the assessments shall be payable in one or more installments, and at such times as the council may prescribe; but this section shall be subject to the provisions of chapter two of this division, and in cities of the first and third grades of the first class, at the time when the council determines that the cost of such improvement is to be assessed as above provided, it shall also determine in how many installments said assessments shall be payable; at what intervals, if payable in more than one installment; also whether or not bonds shall be issued in anticipation of such assessment; and when bonds are issued in anticipation of the collection of such assessment, the interest accrued and to accrue on said bonds shall be considered and treated as part of the costs and expenses of such improvement for which assessments may be made. In cities of the third grade of the first class, such assessments, when made, shall become due and payable at the time and in the manner provided by the council, and if said assessments or any installment thereof shall not be paid at the time the same becomes due, a penalty of fifteen (15) per centum shall thereupon attach to such unpaid assessment or installment, and thereafter such unpaid assessment or installment shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection of such assessment; and the county auditor shall, annually, place upon the tax duplicate the penalty and interest herein provided for. When the council of said cities of the third grade of the first class shall determine to issue bonds in anticipation of the collection of assessments provided for in this section or required by section twenty-two hundred and seventy-four (2274), the provisions of section two thousand seven hundred and two (2702) shall not apply; nor shall said section 2702 apply when a part, not in excess of one-third of the cost and expenses of any such improvement or appropriation is to be paid by any such city by levy or assessment upon the general tax list, issue of bonds, or otherwise, as may be provided by law; and any such city of the third grade of the first

class is hereby authorized to issue and sell its general street improvement bonds at a rate for interest not in excess of five (5) per cent per annum, payable semi-annually, to pay for the city's part or share as aforesaid, of the cost and expense of any such improvement or appropriation, and may levy taxes, in addition to the tax now by law authorized to be levied therein or make assessments as provided in the preceding section to pay such bonds and interest thereon. When the council of cities of the second class and third grade and cities of the second class and third grade (a) determine to issue bonds in anticipation of the collection of assessments to pay the costs and expenses of appropriating lots and lands for the purpose of laying off, opening, extending or widening a street, alley or other public highway, the provisions of section twenty-seven hundred and two (2702) shall not apply."

It will be observed that this statute presupposes an inquiry by council into the question of benefits, since it authorizes an assessment upon the "abutting and such adjacent and contiguous *or other benefitted lots and lands in the corporation*, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made," etc. Thus, it is clear that under this section, whether the assessment is made "in proportion to the benefit," or "according to the value of the property assessed," or "by the foot front of the property bounding and abutting upon the improvement," in either case the assessment can only be upon "such adjacent and contiguous or other benefited lots and lands," etc. That is to say, that no matter whether the assessment be in proportion to the benefits, or according to the value of the property assessed, or by the foot front, yet it can only be levied upon the *benefitted property*.

Section 2283, Bates' Revised Statutes, is as follews:

"Special assessments, whether by the feet front or otherwise, shall be so restricted that the same territory shall not be assessed for making two different streets or avenues, within a period of five years, in such amounts that the maximum assessment herein provided will be thereby exceeded; and so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits of the property assessed."

It will be observed that this section provides that so far as practicable under the provisions of this title, that is to say, under the general provisions upon the subject of assessments, "regard must be had, in making special assessments, to the probable benefits to the property assessed."

Thus we have the statutes of Ohio distinctly providing that in every case where a special assessment is levied for a public improvement, whatever plan or method is adopted in determining the area of the taxable district or the particular lots upon which the burden shall fall, due consideration must be given to the question of special benefits. If, as in the *Norwood-Baker* case, the record discloses that no such consideration could have been given, since the assessment was levied upon one lot alone and was manifestly in substantial excess of possible benefits, there is no presumption of legality and regularity in the proceedings to be overcome by the property owner aggrieved. If, however, as in the case at bar, the facts disclosed in the record itself raise the presumption that due regard was had to the consideration of benefits, this presumption must be overcome by some showing on the part of the plaintiff in error that the plain mandates of the statutes were disregarded by the municipality.

The Supreme Court of Ohio has construed these sections to require a consideration of benefit.

These statutes have been frequently passed upon by the

Supreme Court of Ohio, and the holdings have been uniformly to the effect that no special assessment can be legally levied except upon the basis of the special benefits to the property assessed. In other words, that construction has been put upon them which would make them constitutional, and not that which would make them unconstitutional.

In the case of *Meissner et al.* v. *The City of Toledo et al.*, 31 Ohio St. 386, the Supreme Court of Ohio held that in levying a special assessment to pay the cost and expense of lands appropriated for the extension of a street, the city council was bound to regard special benefits conferred upon the property assessed, and was authorized to appoint a committee of disinterested freeholders to ascertain the special benefits as provided in section 2277, Bates' Revised Statutes (section 284, Municipal Code of Ohio, 66 Ohio L. 284). *There is nothing in the record of the case at bar to show that such an inquiry was not made.* The only facts disclosed by the record are that council determined to levy this assessment according to the "laws and ordinances on the subject of assessments," and that the amount charged against the property of the plaintiff in error was less than one-half the total cost of the improvement.

In the case of *Chamberlain* v. *The City of Cleveland et al.*, 34 Ohio St. 551, the Supreme Court of Ohio in the first and second syllabi say:

"1. To enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment and specially benefitted by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred thereby.

"2. The whole amount of the assessment must be apportioned amongst the several lots and parcels of land specially benefited, in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement."

In the case of *Walsh* v. *Barron*, 42 W. L. B. 302, the Supreme Court of Ohio, in the first syllabus, say:

"The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property."

This last case was decided after the final determination of the case of *Norwood* v. *Baker*. The Supreme Court of Ohio having in view the *Norwood-Baker* decision, as well as its own long line of decisions on the subject of special assessments, say at page 304:

"Upon the admitted averments of the pleadings the naked question here presented is, whether an assessment may be made upon the property of an owner for the cost of a public improvement, that is not only in excess of the benefits conferred on it, but of its value with the benefits added by the improvement. We do not think this can be done where the party complaining in no way promoted the improvement. By no refinement of reasoning can it be construed to be anything else than the taking of private property for public use without compensation. According to the best considered of the modern cases, and the most reliable authorities, an assessment, being sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is *necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement; more, however, cannot be exacted, without impairing the inviolability of private property, guaranteed by the constitution, or in other, if not more appropriate words, confiscating it.*"

In the *Norwood-Baker* case, *more than the value of the entire improvement* was assessed upon the one property owner, since the plaintiff in that case was asked to pay not only the full value for street purposes of the land taken as determined by the jury in the condemnation proceedings, but the cost of such proceedings in addition. In the case at bar, less than one-half the value of the entire benefits conferred by the opening of the street are assessed upon the property of the plaintiff in error.

We submit that neither in the method employed nor in the results as shown by the record is there any basis for the claim that no regard was had to the special benefits conferred upon Henkel's property, or that such special assessment exceeded substantially, materially or to any extent whatever the special benefits conferred.

CONCLUSION.

We do not apprehend that it is the purpose of this court to enlarge the effect of the opinion in the *Norwood-Baker* case beyond the points therein decided. We submit that the principles laid down in that case do not apply where no presumption arises from the record that the municipal authorities failed to obey the law which requires that no special assessment shall exceed the special benefits conferred, and, particularly, where the record shows that such special assessment is not in substantial excess of the special benefits.

In the *Norwood-Baker* case this court expressly declined to overrule former opinions which had sustained special assessments, such as the one here in question, restricting its decision to the extraordinary facts there presented.

In *Spencer* v. *Merchand*, 125 U. S. 345, this court say:

"The legislature in the exercise of its power of taxa-

tion, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of streets, to be assessed upon the owners of land benefited thereby; and the determination of the territorial district which should be taxed for a legal improvement is within the province of legislative discretion."

In *Williams* v. *Eggleston*, 170 U. S. 304, this court say:

"Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement."

In the present case the record shows that under the authority granted by the legislature the city council of the City of Cincinnati declared what lots and lands should be considered as specially benefited by the improvement. Not only this, but when the municipal authorities came to pass the assessing ordinance, it appears from the record that some determination must have been had upon the subject of benefits, since the total cost of the improvement is so apportioned upon the benefited lands that the property of the plaintiff in error bears less than one-half the burden. The mere fact that the assessment was levied by the front foot upon Henkel's lot furnishes no evidence that regard was not had to the special benefits, or that the assessment exceeded the benefits. Whether the total amount assessed against the property of an individual owner is calculated at so much per front foot or is expressed in a lump sum can make no difference in the essence of the thing done. In either case the sum total he is called upon to pay may represent, and, if the statutes and constitution of the state are obeyed, *must* represent, the special benefits conferred upon the property assessed.

In *Parsons* v. *The District of Columbia*, 170 U. S. 45, the court sustained an act of congress in respect to the District

of Columbia, not only determining the area benefited by a public improvement, to wit, the ground fronting on the street in which the improvement was made, but also assessing the cost of such improvement at a specified rate, to wit, $1.25 per front foot, on such area.

We respectfully submit that the record in this case, unlike that in the case of *Norwood* v. *Baker*, neither makes any showing nor raises any presumption that the method employed in levying the assessment here sought to be enjoined precluded an inquiry into the benefits conferred upon the property of the plaintiff in error, or that such inquiry was not in fact made, or that the assessment determined upon was in substantial excess of said benefits. On the contrary, the record shows or at least raises the presumption that the assessment represents the special benefits conferred, was determined upon after due and proper consideration, in obedience to the laws of the state, and violates no provision of the federal constitution.

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted.

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MARCH 5, 1900.